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15 **IN THE UNITED STATES DISTRICT COURT**

16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

17 CHANEE THURSTON, and TANASHA
18 DENMON-CLARK on behalf of themselves and
19 all others similarly situated,

20 Plaintiffs,

21 v.

22 CONOPCO, INC. d/b/a UNILEVER (formerly
23 d/b/a GOOD HUMOR-BREYERS) d/b/a
BREYERS,

24 Defendant.

25 Case No. 10-cv-04937-PJH

**NOTICE OF MOTION, PLAINTIFFS'
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENTS, AND SUPPORTING
MEMORANDUM**

Hon. Phyllis J. Hamilton

Date: March 28, 2012

Time: 9:00 a.m.

Location: Courtroom 3, Oakland Courthouse

1		
2	ROSS CORRIETTE and JAMES WALDRON on behalf of themselves and all others similarly situated,	RELATED CASE Case No. 11-cv-01811-PJH
3	v. Plaintiffs, UNILEVER d/b/a BREYERS,	
4	v. Defendant.	
5		
6	SKYE ASTIANA on behalf of herself and all others similarly situated,	RELATED CASE Case No. 10-cv-04387-PJH
7	v. Plaintiff, BEN & JERRY'S HOMEMADE, INC.,	
8	v. Defendant.	
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TABLE OF CONTENTS

MOTION.....	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT.....	5
I. FACTUAL BACKGROUND.....	5
A. Nature Of The Actions.....	5
B. Litigation And Discovery	6
C. Settlement Discussions	7
II. THE SETTLEMENTS SHOULD BE PRELIMINARILY APPROVED	8
A. The Settlement Classes Should Be Conditionally Certified	8
1. The Settlement Classes Satisfy The Numerosity Requirement	10
2. The Settlement Classes Satisfy The Commonality Requirement	10
3. The Settlement Classes Satisfy The Typicality Requirement.....	11
4. The Settlement Class Satisfies The Adequacy Requirement.....	12
5. The Settlement Class Satisfies The Necessary Criteria Of Rule 23(b).....	12
a. Common Questions of Law and Fact Predominate	13
b. Differences in State Law Do Not Defeat Predominance	15
c. A Class Action Is Superior To Other Methods Of Adjudication.....	19
B. The Substantive Terms Of The Settlements Are Fair, And Should Be Granted Preliminary Approval.....	20
1. The Proposed Settlements Are Within The Range Of Possible Approval As Fair, Reasonable, And Adequate	20
2. The Settlement Was A Product Of Adversarial Arms'-Length Negotiation	22
3. The Proposed Settlement Is Recommended By Class Counsel	23
4. Summary	23
C. The Notice Plan Should Be Approved.....	23
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Alabama v. Blue Bird Body Co., Inc.</i> , 573 F.2d 309 (5th Cir. 1978)	14
<i>Amchem Prods. Inc. v. Windsor</i> (“Amchem”), 521 U.S. 591 (1997).....	17, 18, 19
<i>Arenson v. Whitehall Convalescent & Nursing Home, Inc.</i> , 164 F.R.D. 659 (N.D.Ill. 1996).....	16
<i>Astiana v. Ben & Jerry Homemade Inc.</i> , Case No. 10-4387-PJH.....	<i>passim</i>
<i>Baghdasarian v. Amazon.com, Inc.</i> , 2009 WL 2263581 (C.D. Cal., Jul. 7, 2009).....	19
<i>Bellows v. NCO Fin. Sys.</i> , 2008 U.S. Dist. LEXIS 114451 (S.D. Cal. Sept. 5, 2008).....	25
<i>Boyd v. Bechtel Corp.</i> , 485 F. Supp. 610 (N.D.Cal. 1979)	23
<i>Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.</i> , 917 F.2d 1171 (9th Cir. 1990)	11
<i>Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc.</i> , 148 Ohio App.3d 635 N.E.2d 531 (Ohio App. 2 Dist., 2002)	15
<i>Castro v. Zenith Acquisition Corp.</i> , 2007 WL 81905 (N.D. Cal. Jan. 9, 2007)	20
<i>Chavez v. Blue Sky Natural Beverage Co.</i> , 268 F.R.D. 365 (N.D. Cal. 2010).....	15, 16
<i>Class Plaintiffs v. Seattle</i> , 955 F.2d 1268 (9th Cir. 1992)	21

1	<i>Collins v. Gamestop Corp.</i> , 2010 WL 3077671 (N.D. Cal. Aug. 6, 2010)	15
2		
3	<i>Corriette, et al. v. Unilever</i> , Case No. 11-1811-PJH.....	<i>passim</i>
4		
5	<i>Friedman v. 24 Hour Fitness USA Inc.</i> , 2009 WL 2711956 (C.D. Cal. Aug. 6, 2009).....	13
6		
7	<i>Gattreaux v. Pierce</i> , 690 F.2d 616 (7 th Cir. 1982)	21
8		
9		
10	<i>Gribble v. Cool Transports, Inc.</i> , 2008 WL 5281665 (C.D. Cal. Dec. 15, 2008)	8
11		
12	<i>Gruber v. Price Waterhouse</i> , 117 F.R.D. 75 (E.D.Pa.1987).....	16
13		
14	<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	<i>passim</i>
15		
16	<i>Hanrahan v. Britt</i> , 174 F.R.D. 356 (E.D.Pa. 1997).....	14
17		
18	<i>Ikonen v. Hartz Mountain Corp.</i> , 122 F.R.D. 258 (S.D. Cal. 1998)	10
19		
20	<i>In re Badger Mountain Irr. Dist. Sec. Litig.</i> , 143 F.R.D. 693 (W.D. Wash. 7 1992)	10
21		
22		
23	<i>In re Connecticut General Life Ins. Co.</i> , 1997 WL 910387 (C.D. Cal. Feb. 13, 1997).....	9
24		
25	<i>In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.</i> , 1993 WL 39306 (C.D. Cal. Jan. 12, 1993)	9
26		
27	<i>In re Domestic Air Transp Antitrust Litig.</i> , 141 FRD 534 (N.D. Ga. 1992).....	24
28		

1	<i>In re Portal Software Sec. Litig.</i> , 2007 U.S. Dist. LEXIS 51794 (N.D. Cal. June 30, 2007)	24
2		
3	<i>In re Tableware Antitrust Litig.</i> , 484 F.Supp. 2d 1078 (N.D. Cal. 2007)	23, 25
4		
5	<i>In re Tobacco II Cases</i> , 46 Cal.4th at 327, 93 Cal.Rptr.3d 559, 207 P.3d 20 (Cal. 2009).....	16
6		
7	<i>Jenson v. First Trust Corp.</i> , 2008 U.S. Dist. LEXIS 45078 (C.D. Cal. June 9, 2008)	24
8		
9	<i>Klay v. Humana, Inc.</i> , 382 F.3d 1241 (11th Cir. 2004)	13
10		
11	<i>Liberty Lending Serv. v. Canada</i> , 293 Ga.App. 731 (Ga. Ct. App. 2008).....	16
12		
13	<i>Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.</i> , 244 F.3d 1152 (9th Cir. 2001)	13
14		
15	<i>Mazza v. American Honda Motor Co., Inc.</i> , --- F.3d ---, 2012 WL 89176 (9th Cir. Jan 12, 2012).....	16, 17, 18
16		
17		
18	<i>Mullane v. Central Hanover Trust</i> , 339 U.S. 306 (1950).....	23
19		
20	<i>Officers for Justice v. Civil Service Comm'n</i> , 688 F.2d 615 (9th Cir. 1982)	21
21		
22	<i>Parra v. Bashas, Inc.</i> , 536 F.3d 975 (9th Cir. 2008)	10
23		
24	<i>Plascencia v. Lending 1st Mortgage</i> , 259 F.R.D. 437 (N.D. Cal. 2009).....	15
25		
26	<i>Ross v. Trex Co., Inc.</i> , 2009 WL 2365865 (N.D. Cal. July 30, 2009).....	23
27		
28		

1	<i>Rutstein v. Avis Rent-A-Car Sys., Inc.</i> , 211 F.3d 1228 (11th Cir. 2000)	14
2		
3	<i>Staton v. Boeing</i> , 327 F.3d 938 (9th Cir. 2003)	23
4		
5	<i>Sullivan v. DB Investments, Inc.</i> , --- F.3d ---, 2011 WL 6367740 (3d Cir. Dec. 20, 2011).....	17, 18
6		
7	<i>Tchobanian v. Parking Concepts, Inc.</i> , 2009 WL 2169883 (C.D. Cal. Jul. 16, 2009).....	19
8		
9		
10	<i>Thurston et al v. Conopco, Inc.</i> , Case No. 10-04937-PJH.....	<i>passim</i>
11		
12	<i>Torrissi v. Tucson Elec. Power</i> , 8 F.3d 1370 (9th Cir. 1993)	20
13		
14	<i>Valentino v. Carter-Wallace, Inc.</i> , 97 F.3d 1227 (9th Cir. 1996)	19
15		
16	<i>Van Bronkhorst v. Safeco Corp.</i> , 529 F.2d 943 (9th Cir. 1976)	20
17		
18	<i>Vasquez v. Superior Court of San Joaquin County</i> , 94 Cal.Rptr. 796, 484 P.2d 964 (1971)	16
19		
20	<i>Wolin v. Jaguar Land Rover North America, LLC</i> , 617 F.3d 1168 (9th Cir. 2010)	19
21		
22	<i>Zeisel v. Diamond Foods, Inc.</i> , Case No. 3:10-cv-01192 (N.D.Cal.)	18, 24
23		
24		
25	Other Authorities	
26	1 Herbert Newberg & Alba Conte, <i>Newberg on Class Actions</i> , § 3-13 (3d ed. 1992).....	11, 13
27		
28		

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2	1779 (3d ed.2005)	19
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4	Williston on Contracts s 1515 (3d ed. 1970)	16
5		
6	Rules	
7	Fed. R. Civ. P. 23(a)(1).....	10
8		
9	Fed. R. Civ. P. 23(a)(2).....	10
10		
11	Fed. R. Civ. P. 23(a)(3).....	11
12		
13	Fed. R. Civ. P. 23(a)(4).....	12
14		
15	Fed. R. Civ. P. 23(b)	12
16		
17	Fed. R. Civ. P. 23(b)(3).....	13, 14, 18, 19
18		
19	Fed. R. Civ. P. 23(b)(3)(a)-(d)	19
20		
21	Fed. R. Civ. P. 23(c)(2).....	23
22		
23	Fed. R. Civ. P. 23(e)(2).....	3
24		
25	Fed.R.Civ.P. 30(b)(6).....	7
26		
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MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at the date, time, and location as set forth above, Plaintiffs Thurston, Denmon-Clark, Corriette, and Waldron (the “*Thurston/Corriette* Plaintiffs”) and Plaintiff Skye Astiana (collectively, “Plaintiffs”) will and hereby do, move the Court to grant preliminary approval of two class action settlements as set forth in the Settlement Agreements and exhibits attached herewith.¹

For the reasons set forth in the accompanying memoranda of law filed in support of this Motion, Plaintiffs move this Court to preliminarily approve the two class action settlements (the “Settlements”) set forth in the accompanying Settlement Agreements, to conditionally certify two classes for settlement purposes, to appoint counsel for the *Thurston/Corriette* Plaintiffs as class counsel for the Breyer’s settlement class and counsel for Plaintiff Astiana as class counsel for the Ben & Jerry’s settlement class, respectively, and to approve the proposed form and manner of giving notice to settlement class members of the settlements and advising them of their rights to participate and receive settlement benefits, to exclude themselves, or object.

Plaintiffs also move the Court to enter the following schedule regarding approval of the proposed settlement:

Hearing on Motion for Preliminary Approval of the Settlement	<i>March 28, 2012</i>
Deadline to complete notice (“Notice Date”) to settlement class members by	<i>July 1, 2012</i> (No more than 95 days after preliminary

¹ A copy of the Settlement Agreement entered into between Plaintiffs Chanee Thurston, Tanasha Denmon-Clark, Ross Corriette and James Waldron and defendant CONOPCO, INC. d/b/a UNILEVER d/b/a BREYERS (hereinafter, the “Breyers Settlement Agreement”) is attached hereto as Exhibit A. Supporting exhibits are attached as Exhibits A1-A6.

A copy of the Settlement Agreement entered into between Plaintiff Skye Astiana and Ben & Jerry's Homemade, Inc. (hereinafter, the "B&J Settlement Agreement") is attached hereto as Exhibit B. Supporting exhibits are attached as Exhibits B1-B6.

The Breyers Settlement Agreement and the B&J Settlement Agreement are referred to collectively herein as the “Settlement Agreements.”

1	mail and publication	approval -- Proposed Prelim. App. Orders at ¶ 6)
2	Deadline for filing of motion for final approval of proposed settlement	July 18, 2012 (28 days before Objection date -- Proposed Prelim. App. Orders, p.5 at ¶ 8)
3	Deadline for filing of application by Class Counsel for attorney's fees, reimbursement of litigation costs and expenses, and incentive payment to Class Representative	July 25, 2012 (21 days before Objection Date -- Proposed Prelim. App. Orders, p. 2 at ¶ 7 and p.5 at ¶ 9)
4	Deadline for settlement class members to object to ("Objection Date") or opt out ("Opt-Out Date") of the proposed settlement	August 15, 2012 (No more than 45 days after the Notice Date -- Proposed Prelim. App. Orders, p.3 at ¶¶ 11-12, p. 6 at ¶ 13(a))
5	Deadline for filing supplemental papers in support of Final Approval and addressing any objections	August 29, 2012 (14 days before Final Approval Hearing - Proposed Prelim. App. Orders, p. 5 at ¶ 10)
6	Deadline for settlement class members to submit claims forms ("Claim Deadline")	August 30, 2012 (60 days after Notice Date -- Proposed Prelim. App. Orders, p. 6 at ¶ 12)
7	Proposed Final Approval Hearing	September 12, 2012 (Proposed Prelim. App. Orders, p.6 at ¶ 13)
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Plaintiffs have calculated the above dates for the schedule in bold italics, using March 28, 2012 as an estimated entry date for the Preliminary Approval Orders. If preliminary approval is instead entered at a later date for either or both Settlements, Plaintiffs respectfully ask that the proposed dates in the above chart be pushed back accordingly. A proposed order has been submitted separately for each of the class action settlements.

At the Final Approval Hearing, the Court will have the opportunity to determine whether to grant final approval to the class action settlements, the settlement classes and the requested attorneys' fees and expenses, as well as to evaluate any objections thereto that may have been filed.

1 See Fed. R. Civ. P. 23(e)(2) (directing that class action settlement that purports to bind absent class
 2 members may only be entered after hearing held by the court).

3 **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL**

4 **SUMMARY OF THE ARGUMENT**

5 After a day-long, in-person mediation session on September 14, 2011, and through more than
 6 five weeks of subsequent, extensive negotiations between the parties with the mediator's continued
 7 assistance, settlements in principle were reached to resolve the claims asserted in the related cases,
 8 *Thurston et al v. Conopco, Inc.*, Case No. 10-04937-PJH (the "Thurston Action"), *Corriette, et al. v.*
 9 *Unilever*, Case No. 11-1811-PJH (the "Corriette Action"), and *Astiana v. Ben & Jerry Homemade*
 10 *Inc.*, Case No. 10-4387-PJH (the "Astiana Action") (collectively, the "Actions"), against Conopco,
 11 Inc. d/b/a Unilever (formerly d/b/a Good Humor-Breyers) d/b/a Breyers ("Unilever"), and its
 12 wholly-owned subsidiary, Ben & Jerry's Homemade, Inc. ("B&J") (collectively "Defendants"). The
 13 parties' agreement to resolve the claims asserted in the *Thurston* and *Corriette* Actions against
 14 Unilever based upon its sales of Breyers Ice Cream Products is set forth in the Breyers Settlement
 15 Agreement attached hereto as Exhibit A.² The parties' agreement to resolve the claims asserted in
 16 the *Astiana* Action against Defendant B&J based upon its sales of B&J Ice Cream Products is set
 17 forth in the B&J Settlement Agreement attached hereto as Exhibit B. As detailed below, preliminary
 18 approval of both Settlements should be granted.

19 The Settlements reached are unquestionably fair – they provide class members with
 20 meaningful monetary relief to compensate them for the claims that were pled in the Actions and call
 21 for Defendants to cease the offending practices. The gravamen of the allegations in each of the three
 22 Actions is that Defendants' Ice Cream Products were falsely and misleadingly labeled as "All
 23 Natural" when in fact those Ice Cream Products contained cocoa alkalized with potassium carbonate,
 24 a man-made, synthetic substance. *Thurston*, Doc. 21 at ¶¶ 1-2; *Corriette*, Doc. 1 at ¶¶ 2, 6; *Astiana*,
 25 Doc. 20 at ¶¶ 1-2. The Settlement Agreements redress these allegations by providing that B&J and

26 2 "The Ice Cream Products" at issue include B&J and Breyers ice cream flavors containing alkalized
 27 cocoa, as identified in footnote 3, *infra*; Exhibit A (Breyers Settlement Agreement) at Section II, ¶
 28 20; and in Exhibit B (B&J Settlement Agreement) at Section II, ¶ 20.

1 Unilever will discontinue use of the term “All Natural” on their Ice Cream Products, and reimburse
 2 each B&J and Breyers Settlement Class Member who certifies that he or she purchased B&J or
 3 Breyer Ice Cream Products, \$2.00 per package for each Ice Cream Product purchased, for up to ten
 4 packages. No proof of purchase is required for the first three packages claimed. If Breyers Class
 5 Members’ claims are less than \$2,500,000.00 in total, then the difference between the amount paid
 6 to Breyers Class Members and \$2,500,000 will be donated to not-for-profit charities and/or causes of
 7 Unilever’s choice related to food or nutrition in the United States through *cy pres*. Similarly, for
 8 B&J, which had approximately double the sales volume of Ice Cream Products as did Unilever, a
 9 \$5,000,000.00 restitution fund has been created. If B&J Class Members’ claims are less than
 10 \$5,000,000.00 in total, then the difference between the amount paid to B&J Class Members and
 11 \$5,000,000.00 will be donated to not-for-profit charities and/or causes of B&J’s choice related to
 12 food or nutrition in the United States through *cy pres*. Defendants have also agreed not to use the
 13 disputed “All Natural” claims on all other ice creams, yogurts, and sorbets containing alkalinized
 14 cocoa in the future, thereby providing meaningful injunctive relief to Breyers and B&J Settlement
 15 Class Members. In addition, the Settlement Agreements require B&J and Unilever to bear the cost
 16 of the settlement logistics, including the costs of notice, claims administration, and awarded
 17 attorneys’ fees and expenses. By any objective standard, the Settlements warrant preliminary
 18 approval.

19 The notices of the proposed Settlements also fully comply with Fed. R. Civ. P. 23 and due
 20 process, as they fully advise Settlement Class Members of their rights under the Settlements and are
 21 tailored to provide the best notice practicable under the circumstances. *See* Exhibits A3, A4, B3, and
 22 B4 (proposed Short-form and Long-form notices). Further, the proposed Settlement Classes should
 23 be conditionally certified for settlement purposes since, as detailed below, all of the prerequisites for
 24 certification under Federal Rule of Civil Procedure 23 are satisfied. Thus, certification of both
 25 Settlement Classes is proper.

26 At bottom, the terms of the proposed Settlements are fair, reasonable, and not the subject of
 27 any collusion or unfair dealing. Indeed, under the proposed Settlements, Settlement Class Members
 28 have the opportunity to recover a substantial portion of the retail price for the B&J and/or Breyers

1 Ice Cream Products they purchased, and the allegedly unlawful and misleading product labeling has
 2 been discontinued. At this *preliminary* stage, approval should be granted. Doing so will allow
 3 notice of the proposed Settlements to be sent to the Settlement Classes and, in turn, will allow the
 4 Court to gauge the reaction of the Settlement Class Members to the proposed Settlements.

5 **ARGUMENT**

6 **I. FACTUAL BACKGROUND**

7 **A. Nature Of The Actions**

8 On September 29, 2010, Plaintiff Skye Astiana filed a Complaint for Damages, Equitable,
 9 Declaratory and Injunctive Relief against Defendant B&J in the Northern District of California. *See*
 10 *Astiana*, Doc. 1 at 1. The *Astiana* Action asserted claims for common law fraud, consumer fraud
 11 (*i.e.*, violation of the UCL and FAL), and unjust enrichment on behalf of a nationwide class and a
 12 California sub-class of consumers who purchased B&J's "All Natural" ice creams, yogurts, and
 13 sorbets containing alkalized cocoa, and alleged that B&J had falsely and misleadingly packaged,
 14 marketed and sold its B&J "All Natural" premium ice creams, yogurts, and sorbets as being "All
 15 Natural" despite the fact that they contained alkalized cocoa processed with a non-natural, man-
 16 made, synthetic ingredient – potassium carbonate. *Id.* at ¶¶ 1-2 and n.1.

17 Thereafter, on November 1, 2010, Plaintiffs Thurston and Denmon-Clark filed a Complaint
 18 for Damages, Equitable, Declaratory and Injunctive Relief against Defendant Unilever in the
 19 Northern District of California. *See Thurston*, Doc. 1 at 1. The *Thurston* Action asserted claims for
 20 common law fraud, consumer fraud (*i.e.*, violation of UCL/FAL), and unjust enrichment on behalf of
 21 a nationwide class and a California sub-class of consumers who purchased Breyers "All Natural"
 22 original ice creams, yogurts and sorbets or Breyers Smooth & Dreamy ½ Fat "All Natural" ice
 23 creams, yogurts and sorbets which contained alkalized cocoa, and alleged that Unilever had falsely
 24 and misleadingly packaged, marketed and sold its Breyers brand Original and Smooth & Dreamy ½
 25 Fat ice creams, yogurts, and sorbets as "All Natural" despite the fact that they contained alkalized
 26 cocoa processed with a non-natural, man-made, synthetic ingredient – potassium carbonate. *Id.* at ¶¶
 27 1-2 and n.1.

1 On November 4, 2010, Plaintiffs Corriette and Waldron (along with a third Plaintiff who has
 2 since withdrawn), filed a Class Action Complaint against Defendant Unilever in the District of New
 3 Jersey. *See Corriette*, Doc. 1. The *Corriette* Action asserted claims for consumer fraud, breach of
 4 express and implied warranties, and unjust enrichment on behalf of a nationwide class and a New
 5 Jersey sub-class of consumers who purchased Breyers All Natural Original Ice Cream and Breyers
 6 Smooth & Dreamy ½ Fat All Natural Ice Cream containing alkalized cocoa, and alleged that these
 7 Ice Cream Products were not all natural because they contained alkalized cocoa. *Id.* at ¶¶1-2, 6.

8 The *Thurston* Action was initially assigned to Judge Richard Seeborg, but, given the
 9 common issues of law and fact, as well as the overlapping corporate ownership of B&J and
 10 Unilever, on January 19, 2011 this Court entered an order relating the *Astiana* and *Thurston* Actions.
 11 *See Astiana*, Doc. 34. After Judge William H. Walls ordered the *Corriette* action to be transferred
 12 from the District of New Jersey to the Northern District of California on March 28, 2011, the parties
 13 to the Actions filed a stipulation advising this Court that the *Corriette* Action should be related to the
 14 *Astiana* and *Thurston* Actions as it arose from similar events, involved related defendants, and called
 15 for a determination of substantially similar questions of law and fact. *See Astiana*, Doc. 55 at 2. By
 16 Order entered May 3, 2011, the Actions were related. *See Astiana*, Doc. 58.

17 **B. Litigation And Discovery**

18 Subsequent to the filing of the *Astiana* and *Thurston* Actions, the parties to these two actions
 19 participated in a joint 26(f) conference. Defendants advised that they intended to file motions to
 20 dismiss and strike, and on November 24, 2010 and December 6, 2010, filed those motions in the
 21 *Astiana* and *Thurston* Actions, respectively. *See Astiana*, Doc. 16; *Thurston*, Doc. 17. Defendants'
 22 briefs included an exhaustive array of arguments and defenses, including federal preemption,
 23 abstention, and a Fed.R.Civ.P. 9(b) challenge.

24 In response to Defendants' motions, Plaintiffs Astiana, Thurston, and Denmon-Clark filed
 25 Amended Complaints. *See Astiana*, Doc. 20; *Thurston*, Doc. 21. Thereafter, on December 20, 2010,
 26 Defendants renewed their motions to dismiss and strike, once again vigorously contesting Plaintiffs'
 27 claims. Plaintiffs responded with lengthy, rigorously-argued briefing on the panoply of arguments
 28 set forth by Defendants. *See Astiana*, Docs. 38, 39; *Thurston*, Docs. 34, 35.

1 During this time, Defendant also filed a motion to dismiss the *Corriette* Action, which was
 2 pending in the District of New Jersey. *See Corriette*, Doc. 13. The *Corriette* Plaintiffs opposed
 3 Defendant's motion to dismiss on January 24, 2011, *see id.*, Doc.15, and on March 28, 2011, Judge
 4 William H. Walls denied Defendant's motion to dismiss and ruled that the *Corriette* Plaintiffs'
 5 claims were to be transferred to the Northern District of California, where the *Astiana* and *Thurston*
 6 actions were pending. *Id.*, Doc. 19. Judge Walls further ruled that if the motion to dismiss that was
 7 pending in the *Astiana* and *Thurston* actions was granted for certain, specified reasons, the *Corriette*
 8 Plaintiffs could return to the District of New Jersey to litigate their claims. *Id.*, Doc. 18 at 11.

9 After extensive briefing submitted by the parties, as well as a zealously argued hearing
 10 before the Court on the *Astiana* and *Thurston* motions to dismiss, on May 26, 2011 the Court entered
 11 a 22-page order denying Defendants' motions to dismiss and strike in their entirety. *See Astiana*,
 12 Doc. 62. Subsequent to the Court's May 26, 2011 order, Plaintiffs engaged in discovery, serving
 13 document requests and interrogatories. The parties also agreed to engage in settlement discussions.
 14 *See infra*. Even after the parties agreed in principle to settle this matter, the Plaintiffs continued to
 15 engage in confirmatory discovery regarding Defendants' profits and sales, merits issues, and class
 16 certification issues, including thorough Fed.R.Civ.P. 30(b)(6) depositions of Unilever and B&J on
 17 February 23, 2012 and February 24, 2012, respectively.

18 **C. Settlement Discussions**

19 After a series of preliminary discussions, the parties agreed to mediate on September 14,
 20 2011 before David A. Rotman, Esq., of Gregorio, Haldeman, Piazza & Rotman. During that
 21 mediation, including break-out sessions for the separate cases, and with the assistance of the
 22 mediator, the parties were able to reach agreement on certain key terms of the Settlements, and
 23 agreed to continue negotiating remaining terms thereafter. After approximately five weeks of
 24 continued negotiations involving the mediator, the parties reached agreements in principle to settle
 25 the three Actions, which are reflected in the Settlements presently before the Court.

26 The parties have diligently worked on the Settlements, which are the product of months of
 27 hard fought, arms-length negotiation. Plaintiffs believe the terms of the Settlements are incredibly
 28 favorable to the Settlement Classes, providing substantial remuneration (*i.e.*, \$2.00 per package of

1 B&J or Breyers Ice Cream Products). Settlement Class Members may claim up to three packages of
 2 Ice Cream Products with a sworn attestation of purchase and claim up to 10 packages with the
 3 submission of adequate proofs of purchase. If the claims by the Breyers Settlement Class are less
 4 than \$2,500,000 of purchases, the difference between what has been claimed and \$2,500,000 will be
 5 donated to not-for-profit charities and/or causes of Unilever's choice related to food or nutrition in
 6 the United States as *cy pres*. Likewise, if the claims by the B&J Settlement Class are less than
 7 \$5,000,000.00 of purchases, the difference between what has been claimed and \$5,000,000.00 will
 8 be donated to not-for-profit charities and/or causes of B&J's choice related to food or nutrition in the
 9 United States as *cy pres*. In addition to the monetary compensation, the Settlements also provide for
 10 injunctive relief to the Settlement Classes as B&J and Unilever agree in the future not to use the "All
 11 Natural" claims on products containing alkalized cocoa. This injunctive relief not only provides a
 12 future benefit to the Classes, but also represents a substantial cost to Defendants, since it will cost
 13 \$7,500 per flavor to change Defendants' Ice Cream Products labels. The cost of this change for the
 14 23 flavors of B&J Ice Cream Products and 35 flavors of Breyers Ice Cream Products will be
 15 upwards of \$435,000. Defendants must also bear the costs of the settlement logistics, including the
 16 costs of notice, claims administration, and awarded attorneys' fees and expenses.

17 As demonstrated below, the Notice Plans contemplated by the terms of the Settlement
 18 Agreements provide for both publication notice and direct mail notice where possible, and constitute
 19 the best notice practicable under the circumstances, comporting both with Fed.R.Civ.P. 23 and due
 20 process.

21 **II. THE SETTLEMENTS SHOULD BE PRELIMINARILY APPROVED**

22 **A. The Settlement Classes Should Be Conditionally Certified**

23 The Actions are class actions and, as such, the proposed Settlement Agreements call for
 24 certification of classes for settlement purposes only. *See Exhibit A* (Breyers Settlement Agreement)
 25 at Section III(A)(2) and III(B)(1); *Exhibit B* (B&J Settlement Agreement) at Section III(A)(2) and
 26 III(B)(1). The use of such settlement classes is common and proper in the resolution of class action
 27 litigation. *See, e.g., Gribble v. Cool Transports, Inc.*, 2008 WL 5281665, at * 3 (C.D. Cal. Dec. 15,
 28 2008) (approving settlement class as part of final approval of class action settlement); *In re*

1 *Connecticut General Life Ins. Co.*, 1997 WL 910387, at *1 ¶ 2 (C.D. Cal. Feb. 13, 1997) (certifying
 2 “for purposes of settlement, the Settlement Class defined in Section II and Exhibit E of the
 3 Settlement Agreement”); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust*
 4 *Litig.*, 1993 WL 39306, at *2 ¶2 (C.D. Cal. Jan. 12, 1993) (granting preliminary approval and
 5 certifying “for purposes of this settlement only, Temporary Settlement Classes as defined in the
 6 Settlement Agreement.”).

7 Here, the Breyers Settlement Class is defined as:

8 all persons in the United States who purchased Breyers’ Unilever Ice Cream Products
 9 from November 4, 2004 through the date of Preliminary Approval of Settlement.
 10 Excluded from the Settlement Class are: (i) Unilever and its employees, principals,
 11 affiliated entities, legal representatives, successors and assigns; (ii) any person who
 12 files a valid, timely Request for Exclusion; and (iii) the Judges to whom these Actions
 13 are assigned and any members of their immediate families.

12 Exhibit A (Breyers Settlement Agreement) at Section III.A.2. Similarly, the B&J Settlement Class is
 13 defined as:

14 all persons in the United States who purchased Ben & Jerry’s Unilever Ice Cream
 15 Products from September 28, 2006 through the date of Preliminary Approval of the
 16 Settlement. Excluded from the Settlement Class are: (i) Unilever and its employees,
 17 principals, affiliated entities, legal representatives, successors and assigns; (ii) any person who
 18 files a valid, timely Request for Exclusion; and (iii) the Judges to whom
 19 this Action is assigned and any members of their immediate families.

18 Exhibit B (B&J Settlement Agreement) at Section III.A.2.³

19 Each of the two Settlement Class definitions sets forth an identifiable class, and each tracks
 20 the putative class definitions pled by Plaintiffs. *See Astiana*, Doc. 20 at ¶¶ 25, 27 (alleging class
 21 definition); *Thurston*, Doc. 21 at ¶¶ 25, 27 (same); *Corriette*, Doc. 1 at ¶¶ 1, 15 (same). Because, as
 22
 23

24 ³ Although both class definitions refer to “Unilever Ice Cream Products,” this term is defined
 25 differently for the B&J Settlement Class and Unilever Settlement Class. Under the B&J Settlement
 26 Agreement, “Unilever Ice Cream Products” is defined to mean “Ben & Jerry’s All Natural premium
 27 ice creams, yogurts, and sorbets containing alkalized cocoa,” (Exhibit B at Section II, ¶ 20), while
 28 under the Unilever Settlement Agreement, “Unilever Ice Cream Products” is defined to mean
 29 “Breyers All Natural Original Ice Cream containing alkalized cocoa or Breyers Smooth & Dreamy
 30 ½ Fat All Natural Ice Cream containing alkalized cocoa,” (Exhibit A at Section II, ¶ 20).

1 shown below, the Settlement Classes meet all the requirements of Rule 23, each should be certified
 2 for settlement purposes.

3 **1. The Settlement Classes Satisfy The Numerosity Requirement.**

4 Rule 23(a)(1) requires that “the class [be] so numerous that joinder of all members is
 5 impracticable.” Fed. R. Civ. P. 23(a)(1). It is undisputed that the Actions meet the numerosity
 6 requirement. Further, B&J and Unilever are among the largest ice cream manufacturers in the
 7 United States, and Plaintiffs have alleged, and discovery has confirmed, that hundreds of thousands
 8 of packages of the Ice Cream Products were sold nationwide by both B&J and Unilever during the
 9 approximately four-year class periods for the B&J and Breyers Settlement Classes. Unquestionably,
 10 although Plaintiffs do not know the precise numbers of Settlement Class Members in each of the two
 11 Settlement Classes, the overall number in each Settlement Class satisfies the numerosity requirement
 12 for class certification. *See, e.g., Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal.
 13 1998) (indicating 40 or more members generally sufficient). *See also In re Badger Mountain Irr. Dist. Sec. Litig.*, 143 F.R.D. 693, 696 (W.D. Wash. 7 1992) (indicating a plaintiff may satisfy Rule
 14 23(a)(1)'s numerosity requirement by providing “[a] reasonable estimate of the limited number of
 15 purported class members”)).

16 **2. The Settlement Classes Satisfy The Commonality Requirement.**

17 Rule 23(a)(2) requires that “there [be] questions of law or fact common to the class.” Fed. R.
 18 Civ. P. 23(a)(2). “To establish commonality, ‘[t]he existence of shared legal issues with divergent
 19 factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal
 20 remedies.’” *Parra v. Bashas, Inc.*, 536 F.3d 975, 978 (9th Cir. 2008) (quoting *Hanlon v. Chrysler*
 21 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)). This requirement is easily satisfied.

22 Here, the commonality requirement is met for each of the Settlement Classes because the
 23 claims of all absent Settlement Class Members in each Settlement Class arise from the same
 24 allegations, namely, that B&J and Unilever misleadingly labeled their Ice Cream Products as “All
 25 Natural” even though they contained a synthetic, man-made substance. Thus, common questions for
 26 both the Breyers Settlement Class and the B&J Settlement Class include: (1) whether the Ice Cream
 27 Products labeled as “All Natural” were in fact “All Natural”; and (2) whether Defendants uniformly

1 misrepresented through materially identical labels that their Ice Cream Products containing alkalinized
 2 cocoa with potassium carbonate were “All Natural.”

3 Each of the Settlement Classes shares the commonality requirement in that all Settlement
 4 Class Members in each Settlement Class have claims which depend upon the answers to this set of
 5 common questions. Additionally, the Settlement Classes share the commonality requirement in that
 6 all Settlement Class Members who purchased any of the “All Natural” Breyers Ice Cream Products
 7 as defined in the Settlement Agreements during the class periods are entitled to claim under the
 8 terms of the Settlements.

9 **3. The Settlement Classes Satisfy The Typicality Requirement.**

10 Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of
 11 the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). This requirement is also met here.

12 Courts consistently find that the typicality requirement is satisfied if the claims arise from a
 13 common course of conduct. As stated by Professor Newberg:

14 Typicality determines whether a sufficient relationship exists between the injury to
 15 the named plaintiff and the conduct affecting the class, so that the court may properly
 16 attribute a collective nature to the challenged conduct. In other words, when such a
 17 relationship is shown, a plaintiff’s injury arises from or is directly related to a wrong
 18 to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff’s
 claims is typical if it arises from the same event or practice or course of conduct that
 gives rise to the claims of other class members, and if his or her claims are based on
 the same legal theory

19 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 3-13, at 3-76 (3d ed. 1992).
 20 Typicality does not require the claims to be substantially identical. *Hanlon*, 150 F.3d at 1020.
 21 Rather, the Ninth Circuit has found typicality if the requisite claims “share a common issue of law
 22 or fact’ ... and are ‘sufficiently parallel to insure a vigorous and full presentation of all claims for
 23 relief.’” *Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990)
 24 (citations omitted), amended, 937 F.2d 465 (9th Cir. 1991).

25 Plaintiffs Thurston, Denmon-Clark, Corriette and Waldron, like other absent Breyers
 26 Settlement Class Members, purchased Unilever’s “All Natural” Breyers ice creams based upon
 27 identical written representations prominently displayed on the packages that the ice creams were
 28 “All Natural”. Similarly, Plaintiff Astiana, like other absent B&J Settlement Class Members,

1 purchased B&J Ice Cream Products based upon identical written representations prominently
 2 displayed on the packages that the ice creams were “All Natural.” Because Plaintiffs are members
 3 of the proposed Settlement Classes, and assert claims for common law fraud, consumer fraud, and
 4 unjust enrichment on behalf of themselves and all absent Settlement Class Members based upon
 5 Defendants’ respective uniform courses of conduct and series of identical misrepresentations, their
 6 claims are typical of Settlement Class Members’ claims.

7 **4. The Settlement Class Satisfies The Adequacy Requirement.**

8 Rule 24(a)(4) requires that “the representative parties will fairly and adequately protect the
 9 interests of the class.” Fed. R. Civ. P. 23(a)(4). “Resolution of two questions determines legal
 10 adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other
 11 class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on
 12 behalf of the class?” *Hanlon*, 150 F.3d at 1020. There are no conflicts of interest alleged or that
 13 could possibly exist here. Plaintiffs seek the exact same remedy as all class members: namely, relief
 14 to address the claims that Defendants misrepresented and misbranded their Ice Cream Products in
 15 order to entice individuals to purchase these products when in fact the Ice Cream Products had
 16 synthetic, man-made substances that rendered them non-natural. Plaintiffs’ interests, therefore, are
 17 perfectly aligned with the interests of the Settlement Classes.

18 The adequacy of Plaintiffs and their counsel is evidenced by the Settlements negotiated with
 19 Defendants, which yield meaningful relief to the Settlement Classes. Further, counsel for Plaintiffs
 20 are highly experienced in class action litigation, and have been involved in many class action
 21 settlements and actions. *See* Declaration of Joseph N. Kravec, Jr. (“Kravec Decl.”) filed herewith at
 22 Exs. 1-4 (attaching resumes of class counsels’ law firms).

23 **5. The Settlement Class Satisfies The Necessary Criteria Of Rule 23(b).**

24 In addition to meeting all the class certification requirements enumerated in Rule 23(a), a
 25 movant must also satisfy at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23(b). Here,
 26 the Settlement Classes’ claims may be appropriately certified under Rule 23(b)(3), which provides
 27 that class certification is appropriate if the criteria of Rule 23(a) are met, and if:

1 [T]he court finds that the questions of law or fact common to class members
 2 predominate over any questions affecting only individual members, and that a class
 3 action is superior to other available methods for fairly and efficiently adjudicating the
 4 controversy.

5 Fed. R. Civ. P. 23(b)(3). These so-called “predominance” and “superiority” requirements of Rule
 6 23(b)(3) are readily met in this case.

7 **a. Common Questions of Law and Fact Predominate.**

8 “To establish predominance of common issues, a party seeking class certification is not
 9 required to show that the legal and factual issues raised by the claims of each class member are
 10 identical. Rather, the predominance inquiry focuses on whether the proposed class is ‘sufficiently
 11 cohesive to warrant adjudication by representation.’” *Friedman v. 24 Hour Fitness USA Inc.*, 2009
 12 WL 2711956, at *6 (C.D. Cal. Aug. 6, 2009) (quoting *Local Joint Executive Bd. of*
Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001)).
 13 Here, for each of the two Settlement Classes, this cohesiveness assuredly exists because the
 14 overarching inquiry and interest of all putative class members is whether the members of the
 15 Settlement Classes are entitled to relief for their purchases of Defendants’ misbranded and
 16 misleadingly-labeled Ice Cream Products. This evidence, and proof as to the existence of a legally
 17 cognizable claim to obtain such relief, therefore, would predominate over any individual issues in
 18 adjudicating this case.

19 Professor Newberg summarized the issue by stating that:

20 A single common issue may be the overriding one in the litigation, despite the fact
 21 that the suit also entails numerous remaining individual questions In finding that
 22 common questions predominate over individual ones in particular cases, courts have
 23 pointed to such issues that possess the common nucleus of fact for all related
 24 questions, have spoken of a common issue as the central, or overriding question, or
 25 have used similar articulations.

26 1 Newberg & Conte, *supra*, § 4.25 at 4-85 to 4-86 (internal citations omitted). Similarly, the Court
 27 of Appeals for the Ninth Circuit has explained that the requirement of predominance may be
 28 satisfied by showing that the litigation is dominated by a “common nucleus of facts and potential
 29 legal remedies.” *Hanlon*, 150 F.3d at 1022; *see also Klay v. Humana, Inc.*, 382 F.3d 1241, 1255
 (11th Cir. 2004)(citation omitted) (“Common issues of fact and law predominate if they ‘ha[ve] a

1 direct impact on every class member's effort to establish liability and on every class member's
 2 entitlement to injunctive and monetary relief.””). “[O]ne methodology is to determine whether the
 3 addition or subtraction of any class member would have “a substantial effect on the substance or
 4 quantity of the evidence offered.” *Id.* at 1255 (quoting *Alabama v. Blue Bird Body Co., Inc.*, 573
 5 F.2d 309, 322 (5th Cir. 1978)). If manipulation of the proposed class members does not affect “the
 6 quantum of evidence introduced by the plaintiffs as a whole,” then “common issues are likely to
 7 predominate.” *Id.* Plaintiffs can satisfy Rule 23(b)(3) predominance by showing that “the issues in
 8 the class action that are subject to generalized proof, and thus applicable to the class as a whole, ...
 9 predominate over those issues that are subject only to individualized proof.” *Rutstein v. Avis Rent-*
 10 *A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000).

11 In cases such as the *Astiana*, *Thurston* and *Corriette* Actions, where claims are based on a
 12 single defendant's (either Unilever in the case of the *Thurston* and *Corriette* Actions, or B&J in the
 13 case of the *Astiana* Action) common course of standardized misconduct, predominance of common
 14 questions is easily satisfied. *See, e.g., Hanrahan v. Britt*, 174 F.R.D. 356, 365 (E.D.Pa. 1997)
 15 (finding predominance in allegations that “defendants’ systematic course of conduct misled class
 16 members and concealed material information from putative class”).

17 Here, Plaintiffs maintain, and discovery has confirmed, that labels bearing identical material
 18 “All Natural” claims were made on Ice Cream Products sold nationwide by B&J and Unilever.
 19 Plaintiffs’ common law fraud, consumer fraud, and unjust enrichment claims are all based on the
 20 language of the labels themselves, which are identical with respect to the alleged misrepresentation
 21 that the Ice Cream Products were “All Natural.” Every package of Ice Cream Products purchased by
 22 Plaintiffs and the Settlement Classes included an identical alleged misrepresentation that the Ice
 23 Cream Products were “All Natural” when they in fact contained a synthetic, man-made substance,
 24 namely alkalized cocoa processed with potassium carbonate. This was a material misstatement with
 25 respect to each label. Whether B&J misrepresented that its Ice Cream Products were “All Natural”
 26 is the core predominant issue in every B&J Settlement Class Member’s claim, and, whether Unilever
 27 misrepresented its Ice Cream Products as “All Natural” is the core predominant issue in every
 28 Breyers Settlement Class Member’s claim. For both Settlement Classes, all Class Members’ claims

1 are dependent upon the same factual and legal issues. None of the Settlement Class Members' 2 claims will require case-specific inquiries into the facts surrounding each alleged class member's 3 purchases of the Ice Cream Products to establish liability on behalf of either B&J or Unilever. It is 4 not necessary for the Court to parse through individual fact scenarios to determine whether B&J and 5 Unilever misrepresented the nature of the products they were offering for sale to consumers. The 6 answer would be the same for all Settlement Class Members. As such, common issues clearly 7 predominate and it is fair to say that these related cases are designed precisely for class action 8 treatment.

9 **b. Differences in State Law Do Not Defeat Predominance.**

10 Consistent with the above, differences in state laws do not predominate in this case. Each of 11 the claims asserted on behalf of the Settlement Classes is routinely certified on behalf of national 12 classes, and the elements of these claims are sufficiently similar across the country that they do not 13 present an obstacle to certification.

14 Specifically, numerous courts have certified claims for common law fraud claims on behalf 15 of national classes where those fraud claims are based upon identical, material written 16 misrepresentations. *See, e.g., Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 376-380 17 (N.D. Cal. 2010) (certifying common law fraud claims on behalf of national class); *Plascencia v. Lending 1st Mortgage*, 259 F.R.D. 437 (N.D. Cal. 2009); *Carder Buick-Olds Co., Inc. v. Reynolds & Reynolds, Inc.*, 148 Ohio App.3d 635, 775 N.E.2d 531 (Ohio App. 2 Dist., 2002) (certifying 19 common law fraud claim on behalf of national class; stating "when courts are faced with common- 20 law state claims such as fraud ... they have expressed doubts that differences in state laws are so 21 great as to preclude class treatment ... We also doubt that the elements of a common-law fraud claim 22 could vary greatly from state to state."). *See also, Collins v. Gamestop Corp.*, 2010 WL 3077671, 23 *3-4 (N.D. Cal. Aug. 6, 2010) (refusing to strike allegations of national common law fraud class).

25 Moreover, while defendants opposing class certification have frequently argued that the 26 element of reliance introduces individual issues that require individualized proof, numerous courts 27 have explained that, while reliance is a requirement of common law fraud, "[i]n claims of fraud 28 based upon written representations, the reliance element may sometimes be presumed." *Liberty*

1 *Lending Serv. v. Canada*, 293 Ga.App. 731, 741 (Ga. Ct. App. 2008) (concluding class-wide reliance
 2 could be inferred based upon “fact that similar written representations were common to all the
 3 security agreements at issue”; certifying class claims for common law fraud). *See also Vasquez v.*
 4 *Superior Court of San Joaquin County*, 94 Cal.Rptr. 796, 484 P.2d 964, 973 (1971) citing Williston
 5 on Contracts § 1515 (3d ed. 1970) (“where action is taken in response to material representations,
 6 “in the absence of evidence showing the contrary, it will be presumed that the representations were
 7 relied on”); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 666 (N.D.Ill.
 8 1996) (“Even for the common law fraud claim, which requires proof of reliance, it is well
 9 established that individual issues of reliance do not thwart class actions.”) (citations omitted);
 10 *Gruber v. Price Waterhouse*, 117 F.R.D. 75, 81 (E.D.Pa.1987) (“[T]he existence of individual
 11 questions of reliance does not defeat class certification”).

12 For instance, in *Chavez* – a similar case dealing with misrepresentations on beverage labels –
 13 Chief Judge Walker recently explicitly rejected arguments that individual issues of reliance would
 14 predominate and prevent certification of a common law fraud claim on behalf of a national class of
 15 “consumers who purchased a Blue Sky beverage bearing the allegedly misleading labels in violation
 16 of state [labeling] laws.” 268 F.R.D. at 377. As Chief Judge Walker explained in certifying a
 17 national litigation class, “a presumption, or at least an inference, of reliance arises wherever there is
 18 a showing that a misrepresentation was material [that is] if ‘a reasonable man would attach
 19 importance to its existence or nonexistence.’” *Id.*, citing *In re Tobacco II Cases*, 46 Cal.4th at 327,
 20 93 Cal.Rptr.3d 559, 207 P.3d 20 (Cal. 2009).

21 Here, as in *Chavez*, the alleged misrepresentations on the labels violated applicable product
 22 labeling laws – which is strong evidence of materiality and, *ipso facto*, of reliance. Thus, common
 23 issues clearly predominate with respect to Plaintiffs’ common law fraud claims.

24 In addition, settlement certification of Plaintiffs’ consumer fraud and unjust enrichment
 25 claims is also appropriate. Plaintiffs recognize that the Ninth Circuit Court of Appeals recently held
 26 in *Mazza v. American Honda Motor Co., Inc.* (“*Mazza*”), --- F.3d ---, 2012 WL 89176 (9th Cir. Jan
 27 12, 2012), that certification of a nationwide class of consumers for the purpose of **litigation** under
 28 California’s consumer protection and unjust enrichment laws was inappropriate where the plaintiffs

1 alleged non-uniform misrepresentations and omissions of material facts about an automobile
 2 manufacturer's breaking system. *Mazza*, 2012 WL at * 12. However, it is undersigned counsel's
 3 understanding that the plaintiffs in *Mazza* is seeking *en banc* review of the ruling. Moreover, to the
 4 extent *Mazza* evades or survives *en banc* review, it should not impact grant of a ***settlement-only***
 5 class certification here.

6 Specifically, *Mazza* holds that in the context of certifying a *litigation* class under Rule 23,
 7 predominance is not met when the court must look to the consumer protection and unjust enrichment
 8 laws of each state. *Id.* at *12. This ruling is inapplicable here as Plaintiffs seek nationwide class
 9 certification for the purpose of *settlement*, not litigation.

10 Where a settlement class was concerned, the Supreme Court recognized in *Amchem Prods. Inc. v. Windsor* ("Amchem"), 521 U.S. 591, 625 (1997), that "predominance is a test readily met in
 11 certain cases alleging consumer or securities fraud..." The Supreme Court explained that
 12 predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by
 13 representation." *Id.* at 623. Accordingly when "[c]onfronted with a request for settlement-only class
 14 certification, a district court need not inquire whether the case, if tried, would present intractable
 15 management problems." *Id.* at 620.

16 Relying heavily on *Amchem*, an *en banc* panel of the Third Circuit Court of Appeals,
 17 reviewing a nationwide class certification of consumer fraud and unjust enrichment claims in the
 18 settlement context, recently held that Rule 23's predominance requirement does not preclude
 19 nationwide *settlement-only* class certification of claims brought under the consumer protection and
 20 unjust enrichment laws of all 50 states. See *Sullivan v. DB Investments, Inc.*, --- F.3d ---, 2011 WL
 21 6367740 (3d Cir. Dec. 20, 2011).

22 In *Sullivan*, the parties entered into an agreement to settle claims for antitrust violations on
 23 behalf of a class of indirect purchasers nationwide for claims brought under state antitrust, consumer
 24 protection, and unjust enrichment laws of all 50 states. *Id.* at *4. In response to the settlement,
 25 objectors attacked predominance arguing settlement class certification was inappropriate due to
 26 differences among various states' consumer protection and unjust enrichment laws, specifically
 27 because many states prohibited indirect purchasers from recovering damages for antitrust injuries.
 28

1 *Id.* at 5. The Third Circuit disagreed. Relying on the Supreme Court’s decision in *Amchem*, the
 2 Third Circuit held that “*in the settlement context, variations in state antitrust, consumer protection*
 3 *and unjust enrichment laws did not present the types of insuperable obstacles that could render*
 4 *class litigation unmanageable.*” *Id.* at *16 (emphasis added, internal quotation and citation
 5 omitted).

6 Moreover, the Third Circuit found that for the purposes of certifying a nationwide class for
 7 settlement purposes, the Court need not find that each absent class member has a valid claim as this
 8 would inappropriately introduce the requirements of Rule 12(b)(6) into Rule 23. *Id.* at *17-18 (“a
 9 court may inquire whether the elements of asserted claims are capable of proof through common
 10 evidence, but lacks authority to adjudge the legal validity or soundness of the substantive elements
 11 of asserted claims”). The requirements of Rule 23 are to “assess[]whether a class action ‘would
 12 achieve economies of time, effort, and expense, and promote uniformity of decision as to persons
 13 similarly situated.’” *Id.* at *11 (quoting Fed. R. Civ. P. 23(b)(3) advisory committee’s note to 1966
 14 amendment).

15 It is under these same guiding principles that the Ninth Circuit has upheld *settlement-only*
 16 class certification in nationwide settlements. *See, e.g., Hanlon*, 150 F.3d at 1022 (finding
 17 predominance met for the purpose of certifying a nationwide settlement class alleging individual
 18 states’ breach of express and implied warranties and “lemon laws”). Similarly, in reliance on
 19 *Sullivan*, Judge Jeffrey S. White of this District also granted preliminary approval of settlement post-
 20 *American Honda* to a national class of walnut purchasers asserting claims under the UCL, FAL and
 21 for unjust enrichment. *See Zeisel v. Diamond Foods, Inc.*, Case No. 3:10-cv-01192 (N.D.Cal.), at
 22 Docs. 210 (granting preliminary approval of nationwide settlement) and 212 (granting plaintiff leave
 23 to file supplemental brief on *American Honda* and *Sullivan*), attached as Kravec Decl. Exs. 5 and 6.

24 In sum, Plaintiffs have met their burden at this preliminary stage of demonstrating that the
 25 Settlement Classes’ claims are based on substantially uniform principles of law, and that common
 26 issues of law and fact remain the predominant focus of the Actions.

27
 28

1 **c. A Class Action Is Superior To Other Methods Of Adjudication.**

2 The “superiority” requirement of Rule 23(b)(3) is also easily met in this case. Rule 23(b)(3)
 3 identifies four factors relevant to a superiority inquiry: (1) the class members' interests in
 4 individually prosecuting separate actions; (2) whether any litigation concerning the controversy has
 5 already been brought by class members; (3) the desirability of concentrating the litigation of the
 6 claims in the particular forum; and (4) the likely difficulties in managing a class action. *See Fed. R.*
 7 *Civ. P. 23(b)(3)(a)-(d).* “[T]he purpose of the superiority requirement is to assure that the class
 8 action is the most efficient and effective means of resolving the controversy.” *Wolin v. Jaguar Land*
 9 *Rover North America, LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citing 7AA Charles Wright,
 10 Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1779 at 174 (3d ed.2005)).

11 Here, each of the Rule 23(b)(3) “superiority” factors clearly militates in favor of class
 12 certification. First, there is no interest by Settlement Class Members to individually litigate. Where
 13 damages suffered by each putative class member are small compared to the cost of litigating, this
 14 factor weighs in favor of certifying a class action. *See Wolin*, 617 F.3d at 1175. Although the
 15 damage resulting from Defendants’ alleged misrepresentations to the Settlement Classes are real and
 16 significant, the cost of individually litigating such a case against Unilever or B&J would easily
 17 exceed the value of any relief that could be obtained by any one purchaser. This, alone, warrants a
 18 finding that a class action is a superior method of adjudication. *See Tchobanian v. Parking Concepts,*
 19 *Inc.*, 2009 WL 2169883, at *7 (C.D. Cal. Jul. 16, 2009) (granting motion for class certification and
 20 noting that “[t]his superiority inquiry requires a comparative evaluation of alternative mechanisms of
 21 dispute resolution.”); *Baghdasarian v. Amazon.com, Inc.*, 2009 WL 2263581, at *7 (C.D. Cal., Jul.
 22 7, 2009) (granting motion for class certification and noting that the superiority inquiry is geared to
 23 address “the problem that small recoveries do not provide the incentive for any individual to bring a
 24 solo action prosecuting his or her rights.”). A class action is the superior method to adjudicate class
 25 claims when it will protect the rights of class members who may lack the financial resources to bring
 26 the alleged wrongdoers into court. *Amchem Prods., Inc.*, 521 U.S. at 617. A class action is the
 27 superior method for managing litigation if no realistic alternative exists. *Valentino v. Carter-*
 28 *Wallace, Inc.*, 97 F.3d 1227, 1234 -1235 (9th Cir. 1996).

1 The other factors also each weigh in favor of certification. Regarding the second factor,
 2 there is no evidence of any other litigation involving the claims asserted in the present case. The
 3 third factor also favors certification because efficiency makes it desirable to litigate similar, related
 4 claims in one forum. The fourth factor points to the superiority of a class approach because there is
 5 nothing before the Court to suggest difficulty in managing this case as a settlement class action. On
 6 the contrary, litigating all claims together avoids the risk of inconsistent results for Defendants and
 7 for all Settlement Class Members. In short, a class action here promotes judicial efficiency, avoids
 8 inconsistency, and provides a single forum to resolve numerous common claims.

9 Because each of the proposed Settlement Classes meets all the applicable requirements for
 10 certification under Federal Rule of Civil Procedure 23, the Breyers Settlement Class and the B&J
 11 Settlement Class should be conditionally certified from purposes of settlement. At the Fairness
 12 Hearing, the Court will have the further opportunity to revisit this conditional certification in
 13 deciding whether to grant Final Approval to the Settlement Agreements.

14 B. **The Substantive Terms Of The Settlements Are Fair, And Should Be Granted**
 15 **Preliminary Approval**

16 1. **The Proposed Settlements Are Within The Range Of Possible Approval**
 As Fair, Reasonable, And Adequate

17 Preliminary approval should also be granted to the Settlements because their terms are fair
 18 and reasonable. Ultimately, the decision as to whether to grant preliminary approval to a settlement
 19 of a class action is a matter left to the discretion of the trial court. *See Castro v. Zenith Acquisition*
 20 *Corp.*, 2007 WL 81905, *1 (N.D. Cal. Jan. 9, 2007). In exercising that discretion, however, the
 21 Court should bear in mind that “there is an overriding public interest in settling and quieting
 22 litigation,” and this is “particularly true in class action suits.” *Van Bronkhorst v. Safeco Corp.*, 529
 23 F.2d 943, 950 (9th Cir. 1976). Recognizing that a settlement represents an exercise of judgment by
 24 the negotiating parties, *see Torrisi v. Tucson Elec. Power*, 8 F.3d 1370, 1375-1376 (9th Cir. 1993),
 25 the Ninth Circuit has held that “the court’s intrusion upon what is otherwise a private consensual
 26 agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to
 27 reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or
 28

1 collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair,
 2 reasonable and adequate to all concerned.” *Officers for Justice v. Civil Service Comm’n*, 688 F.2d
 3 615, 625 (9th Cir. 1982).

4 The general standard by which courts are guided when deciding whether to grant preliminary
 5 approval to a class action settlement is whether the proposed settlement falls within the range of
 6 what could be “fair, adequate, and reasonable,” so that notice may be given to the proposed class,
 7 and a hearing for final approval may be scheduled. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276
 8 (9th Cir. 1992); *see also Gattreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (If the court finds
 9 that the proposed settlement is “within the range of possible approval” and that notice should be
 10 given, “the next step is the fairness hearing.”).

11 The proposed Settlements assuredly satisfy the foregoing criteria. The terms of the
 12 Settlement Agreements provide B&J and Breyers Settlement Class Members with meaningful relief
 13 that addresses the precise legal injury that was alleged in the *Astiana*, *Thurston* and *Corriette*
 14 Actions. The recovery offered is real and substantial. In addition to the injunctive relief secured by
 15 the Settlements, each qualifying Settlement Class Member is entitled to receive \$2.00 per package of
 16 Ice Cream Products purchased. Exhibit A (Breyers Settlement Agreement) at Section III(C)(1)(b);
 17 Exhibit B (B&J Settlement Agreement) at Section III(C)(1)(b). Class Members may claim up to
 18 three packages with a sworn attestation of purchase and claim up to ten packages with submission of
 19 adequate proofs of purchase. *Id.* The amounts payable to Settlement Class Members under the
 20 Settlements reasonably approximate the amounts that could have been recovered at trial on a price
 21 premium theory or through restitutionary disgorgement of profits. Indeed, the \$2.00 per package
 22 amount is about 60% of the average retail price paid by Settlement Class Members. Of course,
 23 Defendants’ wholesale price (*i.e.*, revenue) and ultimate profit per package after deduction of costs is
 24 lower than the retail price. By any measure, the Settlements’ terms are fair and reasonable.

25 The Settlements’ terms are also fair and reasonable when considered in light of the uncertain
 26 prospects and risks faced by Plaintiffs and the putative classes. Defendants vigorously denied
 27 liability (and still do) and voiced their intention to vigorously contest not only the ultimate liability
 28 but also the amount of damages. Although the *Thurston/Corriette* Plaintiffs and Plaintiff *Astiana*

1 remained confident of the merits of their cases, the results were not predictable with any degree of
 2 certainty. Further, even if judgment were entered against either or both Defendants, they could still
 3 appeal. Such an appeal to the Ninth Circuit would likely take years to resolve, such that, even if
 4 successful, ultimate relief to the Settlement Classes would likely be years down the road.

5 **2. The Settlement Was A Product Of Adversarial Arms'-Length Negotiation**

6 The discussions and negotiations leading up to the Settlements were conducted in vigorous,
 7 adversarial, and arms-length fashion, which provides added indicia of the fairness of the Settlements.

8 Here, it is undeniable that the settlement negotiations were non-collusive and adversarial in
 9 nature. Before engaging in any settlement talks, the parties vigorously litigated Defendants' motions
 10 to dismiss and motions to strike, which raised exhaustive challenges to Plaintiffs' claims. Further, it
 11 was only after Plaintiffs demonstrated the strength of their claims by overcoming Defendants'
 12 motions to dismiss and strike that Defendants were willing to consider the possibility of mediation.
 13 Thus, it was only in September 2011, after months of litigation and discovery, that the agreements in
 14 principle to settle the three Actions were reached. The settlement negotiations were then presided
 15 over by a professional mediator, including a one-day, in person, session followed by five weeks of
 16 continued negotiations conducted by the mediator.

17 Moreover, the Settlement Agreements were reached at a time when uncertainties lay ahead
 18 for each party. All parties faced the prospect of a protracted and costly discovery process. In
 19 addition, at the Case Management Conference, Defendants indicated that they intended to file a
 20 motion for summary judgment, *see Astiana*, Doc. 66 at 3, the outcome of which, like any other
 21 adversarial motion in litigation, was uncertain. If the motion were granted, then, subject to any
 22 appeal, Defendants' exposure would decrease, potentially completely. On the other hand, even if the
 23 motion were denied, Plaintiffs faced the prospect of arduous preparations for a trial on the merits,
 24 which could go either way. Thus, the chronology of the proceedings made it particularly reasonable
 25 for the parties to explore a settlement at the time that they did, if doing so could be done on a fair
 26 and reasonable basis.

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1 **3. The Proposed Settlement Is Recommended By Class Counsel**

2 The recommendations of class counsel are entitled to a presumption of reasonableness. *Boyd*
 3 *v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D.Cal. 1979). Here, class counsel, and with the well-
 4 informed support of Plaintiffs Thurston, Denmon-Clark, Corriette, Waldron, and Astiana, believe
 5 strongly that the Settlements offer broad and valuable relief to the Breyers Settlement Class and B&J
 6 Settlement Class, and are in the best interest of the Settlement Classes.

7 **4. Summary**

8 The factors to consider in determining the fairness of a proposed settlement must be analyzed
 9 in the context of the settlement as a whole. *Staton v. Boeing*, 327 F.3d 938, 959, 961 (9th Cir. 2003).
 10 Here, all pertinent factors indicate that the Breyers and B&J Settlements are “within the range” of
 11 being fair, reasonable, and adequate. *See, e.g., In re Tableware Antitrust Litig.*, 484 F.Supp. 2d
 12 1078, 1079-80 (N.D. Cal. 2007); *Ross v. Trex Co., Inc.*, 2009 WL 2365865, *3 (N.D. Cal. July 30,
 13 2009). Because the proposed Settlements amount to a reasonable means of resolving the Actions,
 14 and because the risks and expenses inherent in continuing to litigate these matters are significant and
 15 uncertain, the proposed Settlements should be preliminarily approved.

16 **C. The Notice Plan Should Be Approved.**

17 Rule 23 and due process concerns call for notice to be provided to absent Settlement Class
 18 Members in order to inform them of the proposed Settlements, and grant them the opportunity to
 19 opt-out or object. *See Fed. R. Civ. P. 23(c)(2)*. The notice and means of disseminating it must be
 20 the “best notice practicable” under the circumstances. *See Mullane v. Central Hanover Trust*, 339
 21 U.S. 306, 314-315, 317 (1950). That test is clearly satisfied by the parties’ proposed notice.

22 Here, the parties propose to disseminate notice of the proposed class action settlements by:
 23 (1) U.S. Mail for putative class members whose names and addresses are known; (2) by publication
 24 as set forth in the Notice Plans for the remainder of the putative classes whose names and address
 25 cannot be determined; (3) Website provided by the class action claims administrator and the posting
 26 of notices and other settlement papers on class counsel’s websites. Exhibit A (Breyers Settlement
 27 Agreement) at Section V(1) and Exhibit A6 (Decl. of Mark Rapazzini setting forth Breyers Notice
 28 Plan); Exhibit B (B&J Settlement Agreement) at Section V(1) and Exhibit B6 (Decl. of Mark

Rapazzini setting forth B&J Notice Plan). With respect to the publication notice component, the parties propose to disseminate notice of each of the Settlements through the websites and publication in four national circulation periodicals in which Defendants' have historically advertised their Ice Cream Products, namely Cooking Light, Country Living, Entertainment Weekly (print and e-versions), and Rolling Stone (print and e-versions).⁴ Kravec Decl. Ex. 7 (Unilever 30(b)(6) testimony) at 46; Kravec Decl. Ex. 8 (B&J 30(b)(6) testimony) at 6. These publications have a collective readership of over 45 million people. *See Exhibit A6 (Rapazzini Decl. on Breyers Notice Plan)* at attachment B thereto; *Exhibit B6 (Rapazzini Decl. on B&J Notice Plan)* at attachment B thereto. The proposed Notice Plans are tailored to the demographics of consumers of B&J and Breyers Ice Cream Products, as well as to those magazines in which Defendants have historically published, and are appropriate to reach members of the Classes. *See Id.* at ¶ 2 and Ex. 1 thereto; Kravec Decl. Ex. 7 (Unilever 30(b)(6) testimony) at 45-46; Kravec Decl. Ex. 8 (B&J 30(b)(6) testimony) at 5-9. *See also Zeisel v. Diamond*, Case No. 3:10-cv-01192 (N.D.Cal.), Doc. 194 at 2 (approving similar proposed plan of notice in litigation context where notice was tailored to reach consumers), attached as Kravec Decl. Exhibit 9.

The Notice Plans constitute the "best notice practicable" under the circumstances and in similar circumstances has been approved by courts. *See, e.g., Jenson v. First Trust Corp.*, 2008 U.S. Dist. LEXIS 45078 (C.D. Cal. June 9, 2008) (mail notice to all members who could be identified through reasonable effort and by publication, provided the best notice practicable); *In re Portal Software Sec. Litig.*, 2007 U.S. Dist. LEXIS 51794, 18-19 (N.D. Cal. June 30, 2007) (notice by mail and publication was the "best notice practicable under the circumstances"); *In re Domestic Air Transp Antitrust Litig.*, 141 FRD 534, 550-51 (N.D. Ga. 1992) (providing notice by mail to those class members who could be identified and by publication only to those who could not be identified

⁴ The parties propose to publish the Breyers Short-form Notice in Country Living and Cooking Light magazines, and the B&J Short-form Notice in Rolling Stone and Entertainment Weekly. *See Exhibit A6 (Rappazini Decl. on Breyers Notice Plan)* at ¶¶ 2-3; *Exhibit B6 (Rappazini Decl. on B&J Notice Plan)* at ¶¶ 2-3). However, the Breyers Short-form Notice and the B&J Short-form Notice both apprise Settlement Class Members of both Settlements. *See Exhibit A4 (Breyers Short-form Notice); Exhibit B4 (B&J Short-form Notice).*

1 satisfies due process); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal.
 2 2007)(“because defendants do not have a list of potential class members [] the court agrees with
 3 plaintiffs that notice by publication is the only reasonable method of informing class members of the
 4 pending class action and []settlement); Manual for Complex Litigation (4th Ed. 2004) § 21.311
 5 (“Publication in magazines, newspapers, or trade journals may be necessary if class members are not
 6 identifiable after reasonable effort”); *Bellows v. NCO Fin. Sys.*, 2008 U.S. Dist. LEXIS 114451, 6-7
 7 (S.D. Cal. Sept. 5, 2008) (summary notice in USA Today, with national distribution further directing
 8 class members to a dedicated website was the best notice practicable under the circumstances).

9 In addition, the proposed forms of notice also comply with due process requirements and
 10 Rule 23. The proposed forms of notice are attached as Exhibits 3 and 4 to the Breyers Settlement
 11 Agreement, and as Exhibits 3 and 4 to the B&J Settlement Agreement. *See* Exhibits A3, A4, B3, B4
 12 attached hereto. The proposed forms follow the guidelines developed by the Federal Judiciary
 13 Center, www.fjc.gov, use simple and concise language, and effectively inform absent Settlement
 14 Class Members as to the terms of the Settlements, as well as their right to avail themselves of the
 15 Settlements, opt-out, or object. *See* Exhibits A3, A4, B3, and B4.

16 The forms of notice and plan of dissemination should, therefore, be approved.

17 **CONCLUSION**

18 For all the foregoing reasons, the Plaintiff’s Unopposed Motion for Preliminary Approval of
 19 Class Action Settlements should be GRANTED.

20 Dated: February 24, 2012

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